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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1983, Term

DAVID ALLEN SMITH,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT FOR FAILING TO COMPLY WITH THE SPEEDY TRIAL ACT?

A. Petitioner says yes.

II. DID THE COURT ERR IN REOPENING THE CASE AFTER ALL OF THE PROOF HAD BEEN PRESENTED BY THE GOVERNMENT AND THE PETITIONER AND THE CHARGE GIVEN TO THE JURY?

A. Petitioner says yes.

III. DID THE COURT ERR IN FAILING TO DECLARE A MISTRIAL REQUESTED BY THE PETITIONER INSTEAD OF REOPENING THE CASE TO PERMIT THE GOVERNMENT TO INTRODUCE ADDITIONAL PROOF AND EVIDENCE?

A. Petitioner says yes.

IV. GIVEN THE FACTS IN THIS CASE, WAS IT ERROR FOR THE COURT TO SENTENCE PETITIONER TO TWENTY-FIVE YEARS IN THE PENITENTIARY?

A. Petitioner says yes.

V. PETITIONER CONTENDING THAT THE TWENTY-FIVE YEAR SENTENCE IMPOSED UPON THE PETITIONER WAS EXCESSIVE, SHOULD THE COURT REMAND THIS CASE TO THE DISTRICT COURT FOR RESENTENCING?

A. Petitioner says yes.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case, on February 6, 1984, was a per curiam opinion stamped, "Not recommended for full text publication". The text of the opinion appears in the Appendix.

JURISDICTION

This Court has jurisdiction of this cause pursuant to Article III of the Constitution of the United States of America and Rules 19, 20, and 21 of the Supreme Court of the United States. The date of the judgment to be reviewed and the time of its entry was February 6, 1984.

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SMITH,

Petitioner,

VS. NO:_____

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

On or about September 24, 1982, in the Western District of Tennessee, an indictment was returned charging that the Petitioner, David Allen Smith, by force and violence and by intimidation did take $2,827.00 in money from the employees of the First

National Bank in Memphis, Tennessee and did assault said employees and placed their lives in jeopardy by use of a handgun in violation of Title 18, United States Code, Sections 2113 (d) and 2.

Count Two of the indictment charged that the Petitioner on September 24, 1982, by force and violence and by intimidation did take from the person of employees of the First National Bank approximately $2,827.00 belonging to the First National Bank of Memphis, Tennessee, the deposits of which were insured by the Federal Deposit Insurance Corporation in violation of Title 18, United States Code, Sections 2113 (a) and 2.

Petitioner's case was tried from January 10, 1983, through January 13, 1983.

Petitioner filed his regular discovery and inspection of documents motion, and on

January 10, 1983, Petitioner filed his Motion to Dismiss the Government's case for failure to comply with the Speedy Trial Act. At the conclusion of all the proof, Petitioner filed his Motion to Dismiss and also filed his Motion to Dismiss after the Court allowed the Government to reopen its case and introduce additional evidence, which motions were overruled by the Court.

This case was originally set for trial on December 13, 1982, and on December 3, 1982, the Government and the Petitioner announced that they would be ready for trial. On December 7, 1982, Petitioner received a letter from the Clerk stating that the case had been reset for trial at 9:30 o'clock on Monday, January 10, 1983.

This case proceeded to trial on January 10, 1983, and on January 12, 1983, after

motions were heard and the charge of the Court given the jury, the jury was excused for the night to return the next day to start deliberations.

At 9:30 o'clock on January 13, 1983, Assistant United States Attorney, Robert Williams, addressed the Court and asked for permission to reopen the case because, at the conclusion of the proof on January 12, 1983, Mr. Williams told the Court that further investigation revealed circumstances, as will be hereinafter set forth that justified reopening the case. Over strenuous objections by the Petitioner, the Court reopened the case, and additional facts and testimony were introduced, as a result of which the jury returned a verdict of guilty to both counts of the indictment. The Court sentenced Petitioner to twenty-five years in the penitentiary.

While Petitioner filed the ordinary motions to dismiss at the conclusion of the Government's proof and at the conclusion of all the proof, Petitioner will confine his issues for review in this Court to be error for the Court to reopen the case after all of the proof had been introduced, arguments of counsel concluded, and charge of the Court given; and it being error of the Trial Court to deny Petitioner's Motion for Failure to Comply with the Speedy Trial Act, and further that the sentence of twenty-five years in the penitentiary was excessive punishment given the facts in this case.

At the conclusion of the Government's proof, among other witnesses, the Petitioner called Ray Daes to the stand who testified that he lived in Little Rock and Hot Springs, Arkansas and had known the Petitioner, David Allen Smith, for several years and, in

substance, he testified that he and the Petitioner proceeded from Little Rock, Arkansas to Memphis, Tennessee to rendezvous with a person who was to give Ray Daes Six Hundred ($600.00) Dollars, which he would give to the Petitioner in payment of the debt owing by Daes to Smith.

At the point of rendezvous, Daes testified that a person wearing a jumpsuit and motorcycle helmet, with the mask of the helmet shielded by a transparent tape, came between two houses and approached the car where Petitioner and Ray Daes were sitting and pointed a gun at Petitioner Smith and told Smith that he had just robbed a bank, and that he made Smith disrobe and put on the jumpsuit, shoes, and helmet and run, lest he would be killed. David Allen Smith then ran and hid under the deck of a home in

close proximity to the bank that was robbed and was shortly thereafter apprehended by an agent of the Federal Bureau of Investigation. At the scene of the capture, Smith gave an oral statement similar to the testimony of Ray Daes. Smith did not take the stand to testify in his own behalf.

Ray Daes was not believed to be a person in being because of the vague description of Daes and his automobile by Smith at the time Smith was apprehended.

On December 27, 1982, the mother of Petitioner Smith brought Ray Daes to the office of Petitioner's attorney who took a sworn statement from Daes. In substance, the statement was along the lines that he testified in open Court, which was almost identical to the oral statement Smith gave to the agents of the Federal Bureau of

Investigation. At the conclusion of Daes' testimony, counsel for Petitioner presented to Government's counsel the statement of Ray Daes for use in cross-examining him. At 5 o'clock that evening (January 12, 1983), the Court excused the jury until 9:30 o'clock the next morning and instructed the jury to stand by until the next morning to assemble and to deliberate.

At 9:30 o'clock on the morning of January 13, 1983, Assistant United States Attorney, Williams, advised the Court that he had made further investigation of the case to learn that the pistol that was used in the robbery of the bank belonged to the father of Ray Daes who lived in Little Rock, Arkansas, and he moved the Court for leave to reopen the case and introduce additional evidence under Rule 803 of Federal Rules of Evidence, which motion was granted,

and the jury was given another charge, and within approximately fifteen minutes, the jury returned a verdict against the Petitioner as guilty to both counts of the indictment.

Petitioner recognizes, under certain circumstances, that the Court has the right to reopen a case and introduce additional proof, even hearsay proof. However, because of facts hereinafter set forth, Petitioner charges that the Court erred in reopening the case after the case had been submittted to the jury for deliberation

Special Agent of the Federal Bureau of Investigation, P. Michael Dunbar, testified that he and his partner, Richard C. (Dick) Gray, were assigned to investigate this bank robbery and that they cruised the area in their car and approached the home in close proximity to the bank that was robbed and

asked the owner, Mrs. Jane Lewis, if she had seen any strangers in the neighborhood; to which she replied that she had not, but that there was a large deck behind her house which could very well be a place to hide. Mr. Dunbar and Special Agent Gray then began surveilling the house, and as Agent Dunbar approached the rear of Mrs. Lewis' home, he observed Petitioner Smith crawling under the deck of the Lewis home. Agent Dunbar identified himself and instructed Smith to come out from under the deck at the same time Agent Gray arrived at the scene.

Agents Dunbar and Gray then handcuffed Smith and took him to the FBI automobile where they interviewed him briefly and then transported him to FBI headquarters where a detailed oral statement of Smith was taken.

When Agent Dunbar was cross-examined, he stated that he had no was of knowing that

there was a person named Ray Daes. The Petitioner was wearing a motorcycle helmet almost completely disguising his appearance. Yet, Agent Dunbar did not take samples of the Petitioner's hair. Knowing that the weapon had been discharged, he took no paraffin tests.

Even though Agents Dunbar and Gray apprehended Petitioner Smith as he crawled from under the deck, they did not thoroughly search under the deck. Neither Dunbar nor Gray found the money that was taken from the bank or the pistol that was used in the robbery. Dunbar stated that he did not attempt to determine who owned the pistol, although he was told by Smith that Ray Daes lived in Little Rock, Arkansas. Agent Dunbar stated that he did not go under the deck to search for the money for the gun, but that Agent Gray did.

Ray Daes testified that he and his parents lived in Little Rock and Hot Springs, Arkansas and that they were listed in the telephone directory in Little Rock, Arkansas.

On cross-examination, FBI agent, Dick Gray, testified that he did not take any hair samples of the Petitioner's hair, which was crucial to an identify to the Petitioner under the circumstances. Gray transported the Petitioner to the FBI offices and interrogated him for "probably an hour and a half" and still did not go back to search for the money or the weapon, as Agent Gray stated, "Well, it was late before I got out of the office, and I didn't feel it necessary to go out there in the darkness". Petitioner Smith was apprehended at about 11:45 o'clock in the morning and was interrogated for "probably an hour and a half".

When Agent Gray was questioned as to whether or not he thought it necessary to find as quickly as possibly the weapon that was used in robbing the bank, he replied, "I didn't really think much about it at that point". Agent Gray testified that he did not direct the Memphis Police Department (who had possession of the pistol) or any other agents of the FBI, to attempt to lift any fingerprints off the weapon. He testified that the only thing he sent to the FBI laboratory for examination was the yellow pages from the Memphis Telephone Directory. He did not examine the gloves for paraffin or other type tests. These questions and answers were asked of Agent Gray:

> Q. What did you send -- you sent something to the laboratory for examination, didn't you, Mr. Gray?

A. Yes, sir.

Q. What did you send?

A. I sent the yellow pages from the Memphis Telephone Directory.

Q. Did you send anything else?

A. For examination, personally, no, sir.

Q. Did you send the gloves?

A. No, sir.

Q. Why didn't you?

A. I didn't see any point in sending the gloves since the weapon was fired with gloves on it would have been a waste of time and money.

Q. Don't you know that you can lift powder burns and other types of residue from a fired pistol from gloves and hands or anything else?

A. That was also discussed in the conference with Assistant United States Attorney Williams.

Q. What types of examination can you use in the expertise of the FBI to determine whether or not a person fired a weapon?

I'm not talking about paraffin tests, there's other tests, also, aren't they?

A. I imagine there are in balistics.

Q. Well, let me ask you, and see if there are not some.

Aren't there numerous tests for testing for firearm residue?

A. I imagine there are.

Q. You say you imagine?

A. I have never been exposed to that facet of an investigation.

Q. Well, why haven't you?

A. I don't know.

Q. You are the supervisor of this investigation, why haven't you?

You are shaking your head, do you want to answer it.

A. Would you repeat that question?

Q. There are numerous methods of testing for firearm residues, and there are more sophisticated techniques used as neutron activating analysis and atomic --

MR. WILLIAMS: Your Honor --

Q. (Continuing) There are more recently sophisticated techniques such as -- now this I'm talking about the

Department of Justice now, the FBI is a part of the Justice Department, isn't it?

A. Yes, sir.

These questions were asked of FBI Agent Gray:

Q. Did you actually go under the deck, Mr. Gray, to search for these?

A. Yes, sir.

Q. And you didn't -- did you search for the weapon?

A. At that time, no, sir.

Q. Why didn't you?

A. I did not know at that time that the weapon had been recovered, or what had been recovered. I asked him where the money was, and he said it was under the deck.

Q. Didn't it concern you as to where the weapon was also?

A. Obviously, at that point in time I didn't think about it. I was concerned at the time that he had a weapon on him, and there might have been a weapon in view.

Q. That what?

A. That a weapon might be in view or that he had a weapon on his body, that was my concern.

Q. You never went back after September 24th to search this area, did you?

A. No, sir.

Q. Did you?

A. No, sir.

Q. What was the young boy -- did you interview the young boy, do you know who found this pistol?

A. No, sir.

Q. Were you present when it was found?

A. No, sir.

Q. How far under this deck, Mr. Gray, did you go?

I'm showing you here now Exhibit 32 and 31, and just while were are at it, number 20.

How far under that deck did you go?

A. I went all the way to the foundation of the house.

Q. So the jury can see, let's show the jurors this way?

A. I really can't tell from this photograph what area I went into under the deck.

Q. Can you see under here?

A. On up in that area behind the post.

Q. That's the highest point under the deck, isn't it, it graduates upward to the right, doesn't it?

A. Right.

Well, I guess it was -- I was on my knees there.

Q. That must be about three and a half or four feet, doesn't it?

A. Approximately three or three and a half.

Q. And then, of course, then as you look in this direction it gets narrower up there?

A. That's right.

Q. Do you know where the money was found and the pistol was found?

A. No, sir.

Q. Who told you that the pistol and the money had been found?

A. Special Agent Dunbar told me.

Q. Did you ever interview or did anyone interview the young boy that was alleged to have found the pistol?

A. No, sir.

Q. Did you scrape anything under the deck to see if the weapon or any other part of the money was found under the deck?

A. No, sir.

Mrs. Jane Lewis owned the home under the deck of which Petitioner Smith was apprehended. Mrs. Lewis testified that she knew that the pistol was a western-type pistol that had been used in the robbery, and inasmuch as Petitioner Smith was apprehended under her deck, she was apprehensive that, living in a neighboorhood with many children, the children might crawl under the deck and find the pistol and play with it. Mrs. Lewis testified that she was concerned about the failure to find the robbery weapon, and she and everybody

were looking for the money. The following questions and answers were recorded by Mrs. Lewis:

Q. Now, was the gun recovered at that time?

A. No, sir.

Q. All right, and on Sunday did you do anything?

A. Yes, sir.

Q. And this was Sunday after the 24th?

A. Right.

Q. What happened?

A. Well, we still knew that the gun or money had not been recovered, and the police told us the gun looked like an old western six-shooter, and there are a lot of children that play in our neighborhodd around our house. So I was afraid that a child might find it.

So I got a flashlight and crawled up under the deck to see if I could find it. I was worried about the gun, but I discovered the money first instead.

Q. Who was the children that was with you?

A. There were several.

Q. Several children?

A. There were three. I got under there first and then the children showed up.

Q. Did you make a careful search underneath the deck all the way throughout?

A. Well, I started over at this side and went up and across, and when I got to the money we stopped.

Q. All right, describe the area where the money was located, please.

A. Well, the deck at the deepest part is maybe five or six feet, and then it gradually goes up to the house where it is maybe this shallow (indicating) from the deck to the ground.

Q. From the ground to the deck it is less than a foot or more than a foot?

A. About a foot, about that far.

Q. Was this the area that the money was in?

A. Yes, sir, it was found right up next to the house.

Q. Describe the area exactly where the money was in this area that you have just described.

A. All right, the studs that support the deck go this way under the slabs on top. And there were two of them right next to the house, and they were this far apart (indicating).

And the concrete slab was underneath and the deck on top, and so that this tall and about this wide it was just a little tiny crevice and it was in there, and had rocks and dirt clods in front of it.

Q. Where the rocks and dirt clods obstructing the view of the money?

A. Yes, sir, they had to be moved to find it.

Q. To find the money?

A. Uh-huh.

Q. Was this area rather hard to get it?

A. Yes, sir.

Q. Where was it found?

A. Closer to the edge of the deck on this side where the garage is. The gun was found on this side and the money was found over here toward the house.

Q. Was the gun buried or how was it?

A. It was kind of hidden under some leaves.

Q. Was it in plain view when you first saw it?

A. No.

Q. Now, after you found these items did you leave them in place?

A. Yes, sir.

Q. What did you do?

A. I called the crime stoppers and they told the police and they came out.

Q. And the police came, did Mr. Dunbar, the gentleman that first met you on the 24th, also come?

A. Yes, sir.

Q. And was this money and this gun turned over to the police or the FBI?

A. Yes, sir.

Q. Was it a lot of money?

A. Looked like a lot to me.

Q. Did you count part of it?

A. Yes, sir.

Q. How much money did you count?

A. I counted eighteen hundred and fifty-seven dollars, but I was kind of nervous.

Even the most amateurish type of criminal investigation would have required an immediate search of the area where the crime was committed and under the deck where Petitioner Smith was apprehended in order to locate the weapon and the fruits of the crime. Agents of the Federal Bureau of Investigation did not conduct such a search. Anyone could have placed the robbery weapon under Mrs. Lewis' deck from 11:45 o'clock a.m. on September 24, 1982, to the afternoon of September 26, 1982. For the Court to permit the Government to reopen its case and introduce the robbery weapon denied the Petitioner of a fair trial.

As hereinabove stated, the indictment was returned against the Petitioner on

October 5, 1982. On October 14, 1982, the Court set this case for trial on Monday, December 13, 1982, and the report date was set for December 3, 1982.

On December 3, 1982, the Government and the Petitioner announced that they were ready for trial. On December 7, 1982, Petitioner received a letter from the Clerk of the Court stating that this case had been reset for trial to 9:30 o'clock a.m. on January 10, 1983, before Judge Robert M. McRae, Jr.

On Monday, January 10, 1983, Petitioner filed his motion to dismiss this case for failure to grant a speedy trial. The Court's order, filed January 13, 1983, stated that in the opinion of the Court, there had been a full compliance with the requirements of the Speedy Trial Act, namely, that the Petitioner was tried within

70 days, plus excludable time, from the date of his indictment, which was October 5, 1982. The order went on to state that on November 5, 1982, counsel for the Petitioner filed a Motion for Discovery and Inspection beyond the scope of Rule 16. On November 26, 1982, there was a hearing on the motion in Court; that on November 30, 1982, there was entered on the docket sheet the Court's order ruling on the motion and that, therefore, there occurred twenty-five excludable days pursuant to the provisions of Title 18, United States Code, Section 3161 (h) (1) (F), and that if these were the only excludable days, the commencement of the trial should have been January 8, 1983. Because that date was a Saturday, Rule 45 of the Federal Rules of Criminal Procedure allows the trial to begin on January 10, 1983, the date that the case was commenced.

Petitioner does not agree with the Judge's Order on Motion to Dismiss for Failure to Comply with the Speedy Trial Act because Petitioner does not believe that the time between November 26 and November 30, 1982, should be excludable time under the statute.

The Court's order goes on to state that during this period of time, the Western Division of the Western District of the United States District Court in Tennessee had only two judges available to try cases, awaiting replacement for Judge Harry Wellford who had become a member of the Court of Appeals in the meantime.

Further, the Court's order stated that it relegated the instant case to another criminal case which was set on the same date, to-wit, December 13, 1982.

Petitioner calculates that the period from October 5, 1982, to January 10, 1983, excluding delay pursuant to the statute, to be 76 days and, therefore, Petitioner's rights have been denied under the Speedy Trial Act and the Sixth Amendment to the United States Constitution, and that the Court should have granted Petitioner's Motion to Dismiss.

Petitioner recoginzes the extraordinary work load of the Federal Judges in this district, and particularly since Judge Harry Wellford was elevated to the Court of Appeals. However, we have several Judges in senior status that could have been called to ameliorate the crowded criminal docket in the Western District of Tennessee. Petitioner, therefore, submits that the crowded Western District docket should not be a sufficient cause to deny Petitioner a speedy trial under the recent Speedy Trial Act.

ARGUMENT

Petitioner recognized, under Federal Rules of Evidence 803 (24), that under certain circumstances the Court can admit hearsay testimony if "the interests of justice will best be served by admission of the statement into evidence". This Rule goes on to state, however, that the Government is required to make known said intended proof to the Petitioner sufficiently in advance of the trial or hearing to provide the Petitioner with a fair opportunity to prepare to meet the proposed hearsay evidence.

When the Government requested the Court to reopen the case and permit the introduction of an affidavit by FBI Agent Gray and to call the father of Ray Daes to testify in person that the weapon used in robbing this bank was his weapon, the Court erred in denying Petitioner's motion for mistrial.

Petitioner is well aware of the Sixth Circuit Opinion of United States v. Wade, 364 F.2d 931 (1966) and the cases cited thereunder, in which Judge Odell Horton allowed the Government to reopen its case it had rested. However, in the instant case, it was an abuse of the Court's discretion in permitting the Government to reopen its case in view of the dilatoriness and miserably inept investigation of the agents of the Federal Bureau of Investigation which caused the Court to reopen the case and introduce facts and testimony which promptly brought about a verdict of guilty of the Petitioner to both counts of the indictment.

The Courts have stated that even overwhealming evidence of guilt does not obviate the State's obligation to afford a Defendant a fair trial, United States v. Bledsoe, 674 F.2d, 647 (C.A. 8 1982).

Federal Rules of Evidence 803 (24) provides that notice should be given Defendant of its intention to introduce hearsay evidence, and when Petitioner objected to the procedure, the Court should have, at least, granted Petitioner a mistrial to afford him an opportunity to prepare for the "so called" newly-discovered evidence.

Please refer to Footnote 7 of the case of United States v. Didier, 542 F. 2d, 1192 (C.A. 2 1976), which discusses the new Speedy Trial Act (18 USC, Sections 3161-3174), in which the Court stated as follows:

> "In reporting favorably with the new Speedy Trial Act, 18 USC, Sections 3161-3174, the House Committee on the Judiciary emphasiced the importance of the public's interest, stating:
>
> > "The Committee believes that the right to a speedy trial belongs not only to the defendant, but to society as well. A

> defendant who is charged with a violation of the law becomes a burden to society in the sense that his status consumes the time and energy of all components of the criminal justice system with which he comes in contact: the police, magistrate, clerks of court, probation officers, judges and others." U.S. Code Cong. & Admin. News, 93rd Cong., 2d Sess. 1974, p. 7408.

In the Judge's Order Denying Petitioner's Motion for Failure to Comply with the Speedy Trial Act, the Court stated that because of the crowded calendar, it was required to try another criminal case instead of the instant case. Petitioner earnestly submits that the time during which trial Judge was committed to trial of other cases would not be excludable time under District Court's Speedy Trial Plan or under the Speedy Trial Act. The decisions are replete with the principle that court's crowded calendar was not

sufficient reason for delaying in giving the Petitioner a speedy trial.

In the case of United States v. New Buffalo Amusement Park, 600 F.2d, 369 (2d 1979), the Court stated that time during which trial Judge was committed to trial of other cases would not be excluded under District Court's Speedy Trial Plan.

The Eighth Amendment to the United States Constitution provides that excessive bailshall not be required, nor excessive fines imposed, nor cruel and inhuman punishment inflicted.

Please refer to the case of United States v. Martinez-Navarro, 604 F.2d, 1184 (C.A. 9, 1979), in which the Court stated as follows:

"On October 30, 1978, Martinez-Navarro and Enriques-Sanchez appeared

> for sentencing. The district judge stated that a consideration in their sentencing was that he believed that they had lied when they testified at the trial of Palomino-Figueroa.
>
> A sentencing judge may consider a wide range of information in determining a defendant's sentence. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); United States v. Stevenson, 573 F.2d 1105, 1108 (9th Cir. 1978); United States v. Read, 534 F.2d 858, 859 (9th Cir. 1976) (per curiam). Indeed, Congress in 1979 enacted 18 U.S.C. Section 3577, which provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Punishment should be individualized, fitting the offender as well as the crime".

While Petitioner Smith did not take the stand and testify, Ray Daes did take the stand, and it is obvious from the Court's remarks that the Court believed Ray Daes perjured himself and testified falsely.

The fact that Ray Daes testified falsely should be no justification for the Court to impose the maximum penalty of Petitioner Smith.

In the case of United States v. Adams, 555 F.2d 353 (C.A. 3 1977), the Court stated as follows:

> "While we are satisfied that Moriani's plea proceeding was properly conducted, we cannot say that Moriani's contention respecting the increase of his sentence because he lied, is without substance.
>
> * * *
>
> Here, Moriani's situation is somewhat different. Moriani, if he lied, lied as a witness during the trial of a codefendant--not at a trial to determine his own guilt or innocence. In addition, Moriani also was deemed to have lied at his sentencing proceeding when he apparently recited the promises made to him by the government in a form different than that which the district court judge remembered from the time that Moriani retracted his not guilty plea.
>
> * * *

> For the reasons hereinabove set forth, we will reverse and remand to the district court with directions that Moriani's sentence be vacated and that he be resentenced without consideration of his alleged false testimony at trial and at sentencing allocution. Under the circumstances presented, we think it advisable that another district court judge be assigned for resentencing. See Poteet v. Fauver, 517 F.2d at 398.

In the case of United States v. Lincoln, 581 F.2d 200 (C.A. (1978) the Court stated that under Alaska law, maximum sentence is meted out only to those characterized as the worst possible offenders.

Petitioner submits that not only did the Court consider Ray Daes' testimony to be perjury in sentencing your Petitioner, but the Court also imposed the maximum sentence upon your Petitioner because of statements made by the Assistant United States Attorney that Petitioner Smith and his brother were acquitted of criminal charges in Arkansas based upon "similar perjured testimony". The Court stated that ". . . Mr. Smith's statements, seem just horrible lies". Petitioner Smith did not testify in his own behalf.

Petitioner earnestly submits to this Court that the maximum sentence of twenty-five years violated the proscription of the Eighth and Fourteenth Amendments to the Constitution of the United States against cruel and unusual punishment because Petitioner submits such a sentence is grossly disproportionate to the severity of the crime, and that the principle of proportionality should be invoked in this case and that this Court should order a survey to be made of the records of the lower Court to determine whether or not the twenty-five year sentence imposed upon the Petitioner is disproportionate to like sentences in this Court.

See also the case of Helm v. Solem, 684 F.2d 582 (C.A. 8 1982) (cert granted November 8, 1982). See 103 S.Ct. 339. In this case, Helm appealed from his sentence, contending

that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and inhuman punishment, citing United States Constitution, Amendments Eight and Fourteen. This case, citing the case of Rummelle v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382, stated that the punishment received by Helm was cruel and inhuman punishment, and the Court applied the principle of proportionality. Helm had no prior convictions for violent crimes, although Helm had six prior felony convictions, including three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses. The Eighth Circuit reversed and remanded the case with directions to issue the Writ of Habeas

Corpus and directed the State of South Dakota to resentence him.

Petitioner cites to the Court United States v. Barbara, 683 F.2d 164 (C.A. 6 1982). This is a case in which the Appellant challenged the severity of the maximum sentence imposed upon him by the Trial Court. While the maximum sentence was affirmed, the Court stated that it was improper ". . . for a district judge to consider the Defendant a perjurer, when there is no evidence in the record to support that conclusion". See United States v. Phillips, 510 F.2d 134 (C.A. 6 1975); and for the Judge to consider information submitted by the prosecution which is not supported by the record", United States v. Latimer, 415 F.2d 1288 (C.A. 6 1969).

The case of United States v. Barbara, supra, further states as follows:

> "There are basically two exceptions to the unreviewability rule: (1) reliance upon erroneous or improper factors or information in sentencing so as to amount to a gross abuse of discretion; and (2) failure to evaluate the sentencing information submitted, or a total failure to exercise discretion."

Petitioner earnestly submits that the Court relied upon erroneous or improper factors in sentencing the Petitioner to the maximum term of twenty-five years in the penitentiary, and that the Court failed to exercise discretion in sentencing the Petitioner.

In the case of United States v. Phillips, supra, the Defendant was convicted for transporting a stolen motor vehicle in interstate commerce and was sentenced to the maximum term of five years in the penitentiary. Defendant appealed, claiming that the maximum prison sentence imposed was unduly harsh and

was based on assumptions not in the record. In sentencing Phillips, the District Court stated:

> ". . . I just think this is a part of a theft ring, and this man (Phillips) was a cog in the wheel. How big a cog he was, I don't know, whether it was his idea or whether he saw a chance to make some quick money, or whatever it was, I don't know, but there is one thing certain, the whole story hasn't been told.'
>
> There is no evidence in the record to support any such charge against Phillips. The Court further stated:
>
> 'I have to consider the fact that Mr. Ponder has come in here and obviously perjured himself, and I have to further consider the fact, in the opinion of the Judge of the Court, this defendant has perjured himself. I don't believe for one minute that he was over there hitchhiking there by Aberdeen, Maryland (sic) and just happened this U-Haul truck came along and he got it.'
>
> Neither Ponder nor Phillips have ever been convicted or perjury, and it was error for the District Court, in its sentencing, to treat Phillips as if he had been convicted of perjury.

Furthermore, Ponder was the principal actor in the matter; he rented the U-Haul in Kentucky. There is no proof that Phillips did anything other than to be present at the time of renting the U-Haul, and as a passenger in the truck; and as to his presence in Kentucky, even that was disputed.

Ponder had pleaded guilty to the Dyer Act violation and testified that Phillips was not with him at the time of the rental in Kentucky, but that he picked up Phillips later in Ohio. The District Judge had imposed on Ponder the maximum sentence of five years, and he imposed on Phillips whom he termed as only a "cog in the wheel" the same maximum sentence. This simply does not seem reasonable.

Phillips had only one previous conviction, about ten years ago, for which he had been placed on probation. He is married and the father of five children who are dependent upon him for their support. Also, he had been ill and the Court ordered that he be examined at the United States Medical Center at Springfield, Missouri.

The judgment of conviction is affirmed. The sentence is vacated for abuse of discretion, and the cause is remanded for resentencing."

It is to be emphasized that the Petitioner, David Allen Smith, stood before the Court at

the sentence hearing, with a clean record never having been convicted of a misdemeanor prior to this trial; that the Petitioner did not charge into the bank with his pistol firing; that he did not curse, abuse, or threaten any of the employees of the bank, and that it was only upon the instinct of self-preservation that he shot the young man who had tackled him after the Petitioner left the bank.

Recognizing that the Federal Trial Courts look with great disfavor upon perjured testimony, Petitioner believes that the lower court improvidently imposed the maximum sentence upon him because, without evidence in the record, the Petitioner either perjured himself of suborned perjury. At the date of the conviction, the Petitioner was twenty-four years of age and was eligible

for sentencing under the Federal Youth Correctional Act. However, the Court in its Judgment and Commitment Order stated that it did not feel the Petitioner would benefit from treatment under said Act.

Ray Daes, the companion of Petitioner Smith when Smith was convicted of robbing the bank, testified favorably for Petitioner Smith. Daes, in a later case in the same Court, testified for the government against Smith's mother and sister and admitted that he perjured himself when he testified favorably for Petitioner Smith. He was thereafter indicted for perjury and plead guilty.

At the sentencing hearing of Daes, the Court sentenced Daes to an indeterminate sentence under the Youth Correctional Act (18 USCA, 5010 B). Daes, under the United States Parole Commissions Guidelines for

Sentencing, had a salient factor score of nine, which indicates that Daes would be eligible for parole in 20-26 months. Petitioner Smith had a salient factor score of eight and was sentenced as an adult, and he will be eligible for parole in 52-80 months.

Petitioner Smith earnestly submits that Ray Daes was in complete pari delicto with Petitioner. He testified falsely, which Petitioner did not, and for Smith to be sentenced to twenty-five years in the penitentiary is patently disproportionate to the sentence of Ray Daes, when Daes not only participated in the bank robbery, but perjured himself before the Trial Court.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully urges that the conviction of the Petitioner be reversed and

that the indictment be dismissed, or that the case be remanded for a new trial. In any event, Petitioner respectfully urges the Court to either reduce the Court's sentence of the Petitioner or to remand this case to the District Court for re-sentencing.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Charles G. Black, attorney for Petitioner, hereby certify that I have served three copies of the foregoing Petition For A Writ of Certiorari by United States mail, postage prepaid, upon the Honorable Rex Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20543, on this the 16 day of April, 1984.

I also certify that I have served two copies of said Petition upon the Honorable Robert M. Williams, Jr., Assistant United States Attorney, 1026 Federal Building, Memphis, Tennessee 38103, on the 5th day of April, 1984.



Charles G. Black

NOT RECOMMENDED FOR FULL TEXT PUBLICATION. Sixth Circuit Rule 21. Make citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

FILED

Nos. 83-5065/5150

Feb. 6, 1984

UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

John P. Hehman,
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

DAVID ALLEN SMITH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

_____/

BEFORE: KEITH, KENNEDY and JONES, Circuit Judges.

Per curiam. This case is currently before the Court upon David Allen Smith's appeal from his jury conviction for armed robbery.

On appeal, Smith contends that the district court erred in (1) refusing to find a violation of the Speedy Trial Act, (2) sentencing him to 25 years in prison, and (3) allowing the government to reopen its case. Upon consideration of the issues presented by this appeal, we disagree that the district court committed any reversible error.

Defendant Smith was arrested and appeared before a magistrate on September 24, 1982 for allegedly committing a bank robbery on the same date. On October 5, 1982, the Federal Grand Jury for the Western District of Tennessee returned a two-count indictment charging that Smith took by force approximately $2,827.00 in money belonging to the First Tennessee Bank, a bank whose

deposits are insured by the Federal Deposit Insurance Corporation (FDIC) in violation of 18 U.S.C. Section 2113(a) and (2); and that Smith in committing the aforesaid offense assaulted and put in jeopardy the lives of Marvis Ferrante, Doris Scoggins, Jean Jackson and Don E. Warren by use and means of a dangerous weapon in violation of 18 U.S.C. Section 2113 (d) and (2).

The trial date was originally set for December 13, 1982 and on December 3, 1982 the government and the defendant stated that they would be ready for trial. On December 7, 1982, Smith received a letter from the clerk of the court stating that the trial date had been changed to January 10, 1983. The trial did in fact begin on January 10, 1983. On January 13, 1983 after all the proof had been presented and the jury charged, the government asked

permission to reopen the case. The Assistant United States Attorney indicated that further investigation revealed circumstances that justified reopening the case. Over defendant's objection the court reopened the case. The jury thereafter returned a verdict of guilty on both counts of the indictment and the court sentenced defendant to twenty-five years imprisonment.

On September 27, 1982, the Raleigh Branch of the First Tennessee Bank in Memphis, Tennessee was robbed. Several persons including the three tellers approached during the bank robbery identified Smith as the individual who committed the robbery.

After the robbery took place, Memphis police and FBI agents searched the neighborhood in which the bank was located in an

attempt to apprehend the bank robber. FBI agents Dunbar and Gray approached Jane Lewis, the resident of 5415 Kettlebrook Cove, who was standing outside with a young child. The agents asked Ms. Lewis if she had seen any strangers in the neighborhood. She replied that she had not, but she stated that there was a large deck behind her house underneath which a man could hide. Agent Dunbar approached the rear of the house and saw Smith crawling under the deck. Dunbar identified himself and instructed Smith to come out from under the deck. Smith was frisked and informed of his rights. Agent Gray then crawled under the deck and retrieved a white sack and a blue shirt from the area where Smith had been. At that time nothing was found under the deck.

Defendant Smith told the agents that he was hiding under the deck because he was afraid of two men. He stated that he lived in Little Rock, Arkansas, and had come to Memphis with an individual by the name of Ray Daes. Smith stated that he and Ray had been in a car and when they pulled up behind a large white sedan the driver of the sedan got out with a gun, ran up to the passenger door of Ray's car and ordered defendant Smith to get out. At that point, the man, dressed in a motorcycle helmet and green coveralls, as the bank robber had been dressed, allegedly made defendant change his shirt and shoes and then handed defendant a white bag full of money. Defendant told the FBI agents that the white bag of money was under the deck, but the agents were unable to find it. They did,

however, find $760.00 in defendant's sock. The agents also found three pages from the Memphis yellow pages listing the banks in the Memphis area.

On Sunday, September 26, 1982, Jane Lewis decided to search under the deck behind her house. She knew that the weapon which had been used during the bank robbery had still not been found and she was afraid that children might crawl under the deck and find it. She found the gun and a bag of money under the deck. FBI agents Gray and Dunbar had not gone back to try to locate these items between September 24 and September 26, 1982. Nor did they check the gloves found with defendant to determine whether they had any trace of gun powder on them.

At the trial defense counsel called Ray Daes to the stand. He gave a

description of the events on September 24, 1982 which coincided with defendant's story even though Daes and the defendant had apparently not seen or spoken with one another following defendant's arrest. At some point on January 13, 1983, after both sides had submitted their proof, the government asked to reopen the case. They had learned the prior evening that the gun which was recovered from under the deck belonged to Ray Daes' father, Ivan Daes. The district judge allowed the government to bring Ivan Daes in to testify. He identified the gun, which had his social security number engraved on it, and stated that he discovered it was missing on September 1982.

Defendant moved for a mistrial due to the district court's reopening of the case, but the motion was denied. Defendant

was thereafter convicted and sentenced to twenty-five years in prison.

Smith contends that the 97 day lapse between the date of his indictment and the date of trial violated the Speedy Trial Act, 19 U.S.C. Section 3161 et seq. The Speedy Trial Act requires that a defendant be tried within seventy days plus excludable time from the date of his trial. 18 U.S.C. Section 3161 (h) (1) (F) provides that a "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excludable time.

On November 5, 1982, defendant filed a discovery motion which was not ruled upon until November 30, 1982. Therefore, there was a 25 day excludable delay pursuant to Section 3161 (h) (1) (F).

If this had been the only excludable delay, the trial should have commenced on January 8, 1983. Because January 8 was a Saturday, however, the trial did not have to start until the following Monday, January 10, 1983, which is the date the trial in fact began. See Fed. R. Crim. Proc. 45(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday ... in which event the period runs until the end of the next day which is not one of the aforementioned days.").

The district court moreover concluded that the continuance which was ordered between December 13, 1982 and January 10, 1983 was excludable pursuant to Section 3161 (h) (8). Section 3161 (h) (8) excludes the period of a continuance "if the judge granted such continuance on the

basis of his finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The judge concluded that the continuance satisfied these criteria because (1) he had to undergo surgery during the latter part of December, (2) then District Judge Wellford had not been replaced, resulting in a shortage of judges, and (3) another pending case needed to be heard first. Thus the judge concluded that there were two excludable periods, one from November 5 to November 30, 1982 and another from December 13 to January 10. On these facts, we therefore conclude that the district court did not err in finding that the Speedy Trial Act was not violated.

Smith further contends that the district judge erred in sentencing him to 25 years in prison. A district judge has broad discretion in determining what sentence to impose. United States v. Barbara, 683 F.2d 164 (6th Cir. 1982). The general rule is that a sentencing decision by a district judge is unreviewable if it is within the statutory limits as is the sentence in the case at bar. Id.

There are two exceptions to the unreviewability rule: (1) reliance upon erroneous or improper factors or information in sentencing so as to amount to a gross abuse of discretion, and (2) failure to evaluate the sentencing information submitted, or total failure to exercise discretion. United States v. Barbara, supra, 683 F.2d at 166.

In the case at bar, Smith was sentenced to 25 years imprisonment, the maximum sentence permitted for the crime imposed. Defendant contends that this maximum sentence was imposed before the court believed he had given a false story to the police. He cites several cases stating that it is improper for the sentencing judge to take into consideration the fact that defendant committed perjury at trial. In fact, this Court has stated that it is improper for a district judge to consider the fact that defendant is a perjurer when there is no evidence in the record to support that conclusion. United States v. Barbara, supra at p. 167; United States v. Phillips, F10 F.2d 134 (6th Cir. 1975).

Smith, however, did not testify at his trial. He is unable to specify any

language from the district judge which would indicate that the sentence imposed was due to the fact that the judge disbelieved defendant's story. The district judge did state that he did not believe Ray Daes' testimony which essentially corroborated Smith's story. He also made it known that he did not believe Smith's story. However, there is no indication that this was the basis of his sentencing decision. Furthermore, it became clear that the story was untrue when the gun was found to belong to Ivan Daes. Because there was "evidence in the record" which supported the conclusion that Smith did, in fact lie, and the sentence imposed was within the statutory allowance, we do not find that the district court abused its wide discretion in imposing that sentence.

Smith finally contends that the district court erred in allowing the government to reopen its case. The district court's decision to allow the Government to reopen its case cannot be set aside absent a clear abuse of discretion. United States v. Wade, 364 F.2d 931, 936 (6th Cir. 1966) A trial judge has a right to permit the government to reopen its case in order to present pertinent evidence not previously available which has been brought to the attention of the government and which would be of assistance to the jury in determining the guilt or innocence of the accused. United States v. Serio, 440 F.2d 827, 831 (6th Cir.), cert. denied, 404 U.S. 838 (1971). In the case at bar, Ivan Daes' ownership of the gun was a crucial factor, in light of defendant's claim that he did not know the man who had robbed the bank and forced

him to take the money and clothes. The fact that Ivan Daes owned the gun clearly indicated that the defendant's story was a fabrication. As the district court stated:

> "I'm very much concerned about this fraud ... what appears to me to be an obvious contrived defense for the defendant ... I've never seen such a shocking display of perjury in my life ... and suppose the jury does find this defendant not guilty on this obviously perjured and contrived made up story. That would be a serious miscarriage of justice."

TR-539-540. Because establishing ownership of the gun was a key fact in the case, we find that the district court acted within its discretion in allowing the government to reopen its case.

We conclude therefore that each of appellant's assignments of error is without merit. Accordingly, the judgment of the district court is hereby AFFIRMED.

ISSUED AS MANDATE: FEBRUARY 28, 1984.
COSTS: NONE

A True Copy Attest

John P. Hehman, Clerk
By: Audrey Crockett

END OF DOCKET